

Montgomery Ward and United Food and Commercial Workers Union Local 770, AFL-CIO. Case 31-CA-11185

29 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

Upon a charge filed by the Union 29 May 1981 the General Counsel of the National Labor Relations Board issued a complaint on 22 July 1981 against the Respondent. On 8 December 1982 an amended complaint issued. The amended complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by promulgating and maintaining a rule regarding solicitation and distribution of literature commencing in February 1981.

On 23 November 1982 the Respondent, the Union, and the General Counsel filed a motion to transfer proceeding to the Board and a stipulation of facts. The parties waived a hearing and the issuance of a decision by an administrative law judge and submitted the case directly to the Board for findings of fact, conclusions of law, and decision. The parties also agreed that in addition to their formal stipulation and the exhibits attached thereto the entire record before the Board should consist of the charge, the amended complaint, and the motion to transfer proceeding.

On 28 July 1983 the Board issued an order granting the parties' motion, approving the stipulation, and transferring the proceeding to the Board. Thereafter both the Respondent and the General Counsel filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record herein and the briefs, the Board makes the following

FINDINGS OF FACT

1. JURISDICTION

Respondent Montgomery Ward is an Illinois corporation engaged in retail sales at its facility located at 1833 South La Cienega Boulevard, Los Angeles, California. In the course and conduct of its principal business operations the Respondent annually purchases and receives goods or services valued in excess of \$50,000 directly from suppliers located outside the State of California and annually derives gross revenues in excess of \$500,000. Accordingly we find that the Respondent is an employer engaged in commerce within the meaning of

Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Stipulated Facts*

Employee Oranell Moore has been employed as a commissioned salesperson at Respondent's South La Cienega Boulevard store since 1977. On 5 February 1981 Moore began to discuss with her fellow employees the possibility of forming a union. She also began to distribute authorization cards which she had obtained from the Union.

About mid-February the Respondent became aware that employees employed at its South La Cienega Boulevard store were discussing the formation of a union. In late February 1981 the Respondent posted the following rule regarding solicitation and distribution on a bulletin board near the employees' timeclock.

DISTRIBUTION OF LITERATURE AND SOLICITATION ON COMPANY TIME FOR NON-COMPANY ACTIVITIES

Employees may not distribute union literature or solicit membership in unions, or fraternal, religious, social, or political organizations on Company time, or while employees to whom literature is being distributed, or whose membership is being solicited, are on Company time. Company time is that time which the employee is scheduled to be on duty and for which the employee is being paid, excluding rest periods, lunch periods, and time before and after the employee's working day.

Solicitation by employees is permitted on Company property so long as the employees, both those soliciting and those being solicited, are on their own time and the solicitation is conducted in a quiet and orderly manner and does not interfere with the operation of the Company's business. Meetings or speeches are not to be permitted; solicitation which results in disturbing or interfering with the work or function of any of the employees or department is forbidden; solicitation which is detrimental to maintaining the premises in a clean and attractive condition is forbidden.

Solicitation by non-employees of the Company is prohibited at all times in the store and the store operated buildings.

It is a violation of the Company's No Solicitation rule either to solicit or be solicited in a manner prohibited by this rule.

Solicitations for charity drives and fund raising campaigns are to follow the guidelines for solicitation as outlined above. The Company generally supports one all-out community charity drive. Prior approval is required for any additional charity drive held on Company property. There are times when expressions of friendship or goodwill for co-workers are permissible, but in order to protect employees from too frequent collections for such purposes written permission for such solicitation must be obtained from the store manager or personnel manager.

Any violations of the Company No Solicitation rule should be reported at once to your immediate supervisor or a store staff member.

This rule has been included in the Respondent's personnel manual since 1975. This personnel manual is available to certain employees and management personnel employed in the Respondent's personnel department. The above-quoted rule had never been posted in Respondent's South La Cienega Boulevard store.

Respondent's store manager, John Martin, handed Moore a copy of the above-quoted rule on 19 March 1981 while discussing her activities.

B. Contentions of the Parties

The General Counsel takes the position that the Respondent's rule is facially invalid. The General Counsel argues that, since the first sentence in the rule prohibits the distribution of *union* literature *only*, the rule is unlawfully discriminatory. In addition the General Counsel maintains that the prohibition of meetings and speeches contained in the second paragraph is unlawfully broad and unduly restricts the rights of the Respondent's employees. The General Counsel also asserts that the final paragraph of the Respondent's rule encourages employees to engage in surveillance of the solicitation and distribution activities of other employees.

The Respondent contends that its rule regarding solicitation and distribution of union literature is valid on its face. The Respondent maintains that, since the definition of the term "company time" in the first paragraph of the rule comports with the rubric established in *T.R.W. Bearings*, 257 NLRB 442 (1981), its rule is unambiguous and not susceptible to misinterpretation upon a reasonable reading.¹

¹ We note that in *Our Way, Inc.*, 268 NLRB 394 (1983), we overturned *T.R.W.* and returned to the "long-held standard that rules banning solicitation during working time state with sufficient clarity that employees may solicit on their own time." Member Zimmerman dissented from the overruling of *T.R.W.*

C. Discussion

We agree with the General Counsel that the prohibition against the distribution of union literature, the ban on meetings and speeches, and the solicitation of reports of violations of the rule render the Respondent's no-solicitation, no-distribution rule facially invalid.² That the Respondent has provided a legally adequate definition of the term "company time" fails to remedy these defects. Thus, even under the recent holding in *Our Way, Inc.*, above, the Respondent's rule is invalid.

It is well established that discriminatory enforcement of a facially valid no-solicitation, no-distribution rule violates Section 8(a)(1). See *Saint Vincent's Hospital*, 265 NLRB 38 (1982). A fortiori a rule which is discriminatory on its face also violates Section 8(a)(1). Thus an employer may prohibit employees from engaging in activities not associated or connected with their work during working time; however, such a prohibition may not single out union activities.³ The first sentence⁴ of the Respondent's rule specifically prohibits the distribution of union literature. The rule makes no mention of the distribution of other types of literature although as the prohibition on solicitation reveals the Respondent was fully cognizant of the variety of organizations other than unions on whose behalf its employees might distribute literature. Accordingly we find that this prohibition is patently discriminatory.⁵

We further find that the ban on meetings and speeches is overly broad.⁶ We first note that the distinction between the types of speeches and meetings within the bounds of the rule's solicitation allowance and those excluded by this provision is one that eludes us. On its face the rule bans all meetings and speeches anywhere at any time. Even if such a distinction were ascertainable,⁷ however, the ban on meetings and speeches is unqualified. Thus even when read narrowly the ban may reasonably be construed to include nonselling areas of the Respondent's store even when an employee is

² Chairman Dotson agrees with his colleagues that the ban on meetings and speeches is overly broad and thus renders the rule invalid. He finds it unnecessary to express an opinion on the other provisions of the Respondent's rule.

³ *Imco Container Co.*, 208 NLRB 874 (1974).

⁴ "Employees may not distribute union literature or solicit membership in unions, or fraternal, religious, social, or political organizations on Company time"

⁵ *Imco Container Co.*, supra; *Olympic Medical Corp.*, 236 NLRB 1117 (1978), enfd. 608 F.2d 762 (9th Cir. 1979), and *Time-O-Matic, Inc. v. NLRB*, 264 F.2d 96 (7th Cir. 1959).

⁶ "Meetings or speeches are not to be permitted."

⁷ It is well settled that ambiguities in work rules promulgated by an employer must be resolved against the promulgator of the rule rather than the employees who are required to obey it. *Paceco*, 237 NLRB 399 (1978); *J. C. Penney Co.*, 266 NLRB 1233 (1983).

not on "Company time." Although we have recognized the right of retail establishments to prohibit activity in selling areas,⁸ we have never found that this right justifies so sweeping a ban as that found in the Respondent's rule.⁹ Furthermore, the Respondent provides no justification nor does it assert any need for so broad a prohibition. Accordingly we conclude that the ban on meetings and speeches is unlawfully broad.

We conclude that the last paragraph of the Respondent's rule that directs employees to report violations of the rules also is unlawful. The rule's prohibition against the distribution of only union literature is discriminatory and its ban on meetings and speeches is overly broad. Thus the rule directs employees to report such conduct that it unlawfully prohibits. To encourage the Respondent's employees to engage in surveillance of the protected concerted activities of their fellow employees and to report those activities to the Respondent violates Section 8(a)(1) of the Act.

For all of the foregoing reasons we conclude that the Respondent's no-distribution, no-solicitation rule is violative of Section 8(a)(1) of the Act.¹⁰

On the basis of the foregoing findings of fact and on the entire record in this case, we make the following

CONCLUSIONS OF LAW

By maintaining a no-distribution, no-solicitation rule which discriminatorily prohibits the distribution of union literature, prohibits all meetings and speeches, and directs the Respondent's employees to report violations of those prohibitions, the Respondent has engaged in and is engaging in unfair

labor practices within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in and is engaging in unfair labor practices within the meaning Section 8(a)(1) of the Act, we shall order it to cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Montgomery Ward, 1833 South La Cienega Boulevard, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining any rule which discriminatorily prohibits the distribution of union literature, prohibits all meetings and speeches, and directs its employees to report violations of such prohibitions.

(b) Enforcing against its employees any rule which discriminatorily prohibits the distribution of union literature or which prohibits all meetings or speeches.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rule posted in February 1981 which discriminatorily prohibits the distribution of union literature, prohibits all meetings and speeches, and directs the Respondent's employees to report violations of those prohibitions.

(b) Post at its store in Los Angeles, California, copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps have been taken to comply.

⁸ See, e.g., *May Department Stores*, 59 NLRB 976 (1944), enfd. as modified 154 F.2d 533 (8th Cir. 1946), and *Marshall Field & Co.*, 98 NLRB 88 (1951), enfd. 200 F.2d 375 (7th Cir. 1953).

⁹ *J. C. Penney Co.*, above.

¹⁰ The General Counsel also contends that the timing of the Respondent's posting of the rule suggests that the rule was consciously designed to interfere with its employees' protected concerted activities. The General Counsel also argues that the delivery of the rule to Moore during her discussion with Martin discouraged the Respondent's employees' exercise of their Sec. 7 rights. The Respondent contends that the fact that it posted its rule regarding solicitations and distribution shortly after union activity commenced does not alone evidence a discriminatory intent in the promulgation of the rule. The Respondent emphasizes that the rule was actually promulgated in 1975 and that it was available, albeit on a limited basis, to certain of its employees. The Respondent also notes that the record is devoid of any indication that the rule was posted with a discriminatory intent or that it was ever applied in a discriminatory manner. Thus, relying on *Sequoyah Spinning Mills*, 194 NLRB 1175 (1972), and *Veeder-Root Co.*, 192 NLRB 973 (1971), the Respondent maintains that it did not violate Sec. 8(a)(1) of the Act by merely posting its preexisting rule regarding solicitation and distribution.

In view of our findings that portions of the text of the Respondent's no-solicitation, no-distribution rule violate Sec. 8(a)(1) of the Act, coupled with our order to remedy these violations, we do not pass on the General Counsel's timing allegations.

¹¹ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT maintain in our personnel manual any rule which discriminatorily prohibits the distribution of union literature or prohibits all meetings or speeches, and which directs our employees to report violations of such prohibitions.

WE WILL NOT enforce against our employees any rule which discriminatorily prohibits the distri-

bution of union literature or which prohibits all meetings or speeches.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the rule in our personnel manual and posted in late February 1981 at our store located at 1833 South La Cienega Boulevard, Los Angeles, California.

MONTGOMERY WARD